Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-531

ARKANSAS DEPARTMENT OF LABOR,
Petitioner

v.

FAIRFIELD COMMUNITIES LAND COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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v.

FAIRFIELD COMMUNITIES LAND COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The Arkansas Department of Labor petitions for a writ of certiorari to review the judgment of the Supreme Court of Arkansas entered in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Arkansas appear in Appendix A hereto. They are reported at 538 S.W.2d 698 and 538 S.W.2d 700.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on July 19, 1976, and this petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether an Arkansas statute which requires payment of premium pay for overtime work to female employees is invalid under the Supremacy Clause of the Constitution of the United States in view of the ban on sex discrimination in employment contained in Title VII of the Civil Rights Act of 1964 and other federal law?

STATUTORY PROVISIONS INVOLVED

ARK. STAT. ANN. § 81-601 (Repl. 1960), 42 U.S.C. §§ 2000e-2(a), 2000e-7, and 2000h-4, 29 U.S.C. § 206(d)(1), and the Supremacy Clause of the Constitution of the United States appear in Appendix B hereto.

STATEMENT OF THE CASE

On February 8, 1973, the Arkansas Department of Labor filed a civil action in a state trial court against Fairfield Communities Land Company, seeking a total of $3,674.04 in unpaid wages for 170 female employees of the defendant.

The obligations which the employer was alleged to have violated are contained in ARK. STAT. ANN. § 81-601 (Repl. 1960), requiring that female employees be paid time and one-half for all hours worked over eight in one day and on the seventh consecutive day in one week.[1]

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[1] The Arkansas Department of Labor is responsible for enforcing the overtime obligations by civil suit. ARK. STAT. ANN. § 81-612 (Repl. 1960).

In an amended answer the employer asserted that the Arkansas statute was invalid because of the preemptive effect of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* On the pleadings and a stipulated record, the trial court dismissed the complaint; the Department appealed to the Supreme Court of Arkansas.

A majority of the highest state court affirmed the dismissal because the "statute undoubtedly discriminates in favor of women on the sole basis of their sex."[2] 538 S.W.2d at 699. It declined to follow a different application of the same Arkansas statute by the United States Court of Appeals for the Eighth Circuit in *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972), and relied instead on a Ninth Circuit decision invalidating a similar California statute, *Homemakers, Inc. v. Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied sub nom. California Dept. of Industrial Relations v. Homemakers, Inc.*, 96 Sup. Ct. 803 (1976).

The dissenting justice believed the *Potlatch* result superior to that of *Homemakers;* "the choice is between invalidating the Arkansas statute and lowering wages for female employees or holding the statute valid and equalizing benefits between male and female employees." 538 S.W.2d at 701.

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[2] Although there had been a contention that the federal question was not properly before the Supreme Court of Arkansas, the court expressly held that it was. 538 S.W.2d at 699. *Cf. Whitney v. California*, 274 U.S. 357, 360-61 (1927). To some degree another requirement of ARK. STAT. ANN. § 81-601 (Repl. 1960), that permits be obtained before an employer treats female employees in certain ways, also was an original issue below, but this petition is directed only at that central portion of the decision which invalidated the overtime wage requirements. *Compare California Dept. of Industrial Relations v. Homemakers, Inc.*, 96 Sup. Ct. 803, 803-04, n. 1 (1976) (dissent).

REASONS FOR GRANTING THE WRIT

1. There Is a Major Unresolved Conflict of Legal Authority Concerning the Validity of State Legislation Which Benefits Female Employees in Relation to Federal Legislation Which Prohibits Sex Discrimination in Employment.

A. Arkansas Supreme Court v. Eighth Circuit

The Arkansas statute in question is one of several kinds,[3] in many states,[4] which benefit women as employees.[5] Its original version was passed in 1915; it has been amended eleven times[6] by the Arkansas General Assembly.

In the most serious previous judicial challenge a large Arkansas employer sought an injunction against its enforcement on the theory that it was preempted by Title VII. The District Court dismissed the complaint, and the Eighth Circuit affirmed.

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[3] The most apparent *beneficial* statutes are those which provide for minimum wage levels for straight time or overtime work; those which require rest periods, lunch breaks, or minimum rest room facilities may be in the same category. *See* Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HAST. L.J. 305, 320-44 (1968).

[4] For an indication of the range of state statutes *see* Comment, *Employment Practices and Sex Discrimination: Judicial Extension of Beneficial Female Protective Laws*, 59 CORN. L. REV. 133, n. 1 (1973).

[5] Clearly statutes which expressly or in effect deny women employment opportunity are not beneficial and by virtue of Title VII are invalid. *E.g., Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971).

[6] Arkansas Act 191 of 1915 was amended in 1919, 1921, 1931, 1935, 1937, 1943 (twice), 1955 (twice), 1963 and 1968. Premium pay for females working over eight hours a day was added by Act 70 of 1943.

Potlach Forests, Inc. v. Hays, 318 F. Supp. 1368 (E.D. Ark. 1970), *affmd. sub nom. Hays v. Potlach Forests, Inc.*, 465 F. 2d 1081 (8th Cir. 1972).

In the leading expression of the principle, the Eighth Circuit relied upon express congressional disclaimer of preemption (465 F.2d at 1082), clear direction of the closely related Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), not to lower wages to achieve equality (*Id.* at 1083), formal codification of Equal Employment Opportunity Commission expertise in favor of extension rather than elimination of benefits (*Id.* at 1083-84), and the fact that "no unreasonable burdens are imposed by extending the benefits of the Arkansas statute to male employees" (*Id.* at 1084).

The opinion concluded by quoting from the District Court:

> The financial burden thus placed upon Potlatch may seem onerous, but federal labor legislation enacted over the last thirty odd years has placed many onerous burdens on employers. It is open to Arkansas employers generally to seek repeal of Act 191 of 1915.[7] It is open to Potlach as an individual employer to rearrange its working schedules so that nobody works more than eight hours a day until all employees have worked their first forty hours in a workweek.

Id. at 1084.

The majority opinion of the Arkansas Supreme Court discussed *Potlatch* at length,[8] but found the *Homemakers* view

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[7] And indeed they have. Since 1970 at least six unsuccessful attempts have been made to amend the overtime pay requirement. *Ark. Legis. Dig.* H-N-43 (1971), H-N-22 (1973), S-N-23 (1973), H-N-14 (1975), H-N-22 (1975), H-N-24 (1975).

[8] "We are unable to agree with the *Potlatch* opinions, because we think they oversimplify the issue." 538 S.W. 2d at 699. The "com-

of the Ninth Circuit more persuasive. In prime circular reasoning, Justice Smith concluded:

> The Supreme Court now holds that an act which discriminates between men and women is invalid as a denial of the equal protection of the law unless there is a reasonable basis for the distinction. *Reed v. Reed*, 494 U.S. 71 . . . (1971). Hence Act 191 is now prima facie invalid, because with respect to many office and clerical jobs[9] there is no sound reason for paying time-and-a-half overtime to women while denying it to men. Of course it follows that if the Arkansas act is now invalid, its benefits cannot simply be extended to male employees under the *Potlatch* rationale.

538 S.W.2d at 700.

The dissent found the issue to have been "decided" in *Potlatch*, especially in view of the "conflict between the circuits" with Arkansas in the validating circuit. *Id.* at 700, n. 1. Citing "ample precedent to support the judicial extension of benefits" Justice Roy declared:

> For compelling reasons the Arkansas overtime act should be preserved. It is a law which serves untold numbers of working people. Neither repeal of the law nor judicial legislation is necessary, but a fair and reasonable accommodation is warranted. Any conceivable disharmony between the State and Federal laws may be fairly accommodated by adopting the extension of benefits rule. There is nothing more fundamental to the welfare of the Arkansas citizenry than adequate wages, and nothing more essential than the law's even application in this vital area. To uphold the existing law would produce the proper balance by preserving its benefits while fulfilling Title VII's promise of fair employment practices.

Id. at 701.

plication" discussed by the majority was the surmise that in 1917, when the original statute was upheld, it "would not have been sustained had it merely regulated wages and hours." *Id.* at 700. Any federal constitutional theory on which such conclusion could be based was destroyed by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). No legitimate state ground could thereby exist because when the cited case, *State v. Crowe*, 197 S.W. 4 (Ark. 1917), was decided *the overtime premium pay provision in question was not even part of the statute;* it was not added until 1943. *See* note 6, *supra. Cf., Ward v. Board of Commnrs.*, 253 U.S. 17, 22-23 (1920).

[9] The record contains no reference to "office and clerical jobs."

B. Arkansas Supreme Court v. Federal Administrative Agencies

The majority decision of the Supreme Court of Arkansas also is in conflict with regulations of the agencies charged with administration of the federal statutes involved.[10]

Equal Employment Opportunity Commission guidelines, entitled to "great deference"[11] in interpretation of the Act, include:

> A number of states require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:
>
> (i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by state law; or

[10] The regulations are reprinted as Appendix C herein. *See* Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1187-88 (1971).

[11] *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

(ii) It does not provide the same benefits for male employees.

29 C.F.R. § 1604.2(b)(3).[12]

The Secretary of Labor has considered the validity of such state statutes in light of the Equal Pay Act of 1963, a closely related federal enactment:

> If as a result of State law, female employees in an employer's establishment are paid overtime premiums for hours worked in excess of a prescribed maximum in any workday or workweek, the employer must pay male employees performing equal work in such establishment the same overtime premiums when they work such excess hours . . . .

29 C.F.R. § 800.162.

C. **Eighth Circuit v. Ninth Circuit**

The *Potlatch* result in the Eighth Circuit was considered by the Ninth Circuit in *Homemakers, Inc. v. Division of Industrial Welfare, supra,* involving a similar California statute.

As its first ground for decision, the court refused to follow *Potlatch* because "it would usurp the legislative power vested exclusively in the state." 509 F.2d at 22.

Certiorari was denied, with two members of this Court issuing a dissent:

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[12] Thus speculation that the Arkansas statute might discourage employers from employing women (*see Hays v. Potlatch Forests, Inc., supra,* 465 F.2d at 1082, n. 3), is no ground for invalidating it as that response itself would be an unlawful employment practice. There is nothing in the instant record to indicate such phenomenon. Males, when disadvantaged, also have Title VII protection. *Cf. McDonald v. Santa Fe Trail Transp. Co.*, 96 Sup. Ct. 2574 (1976).

> These are substantial questions, and it is the Court's duty to resolve this disagreement which now impedes the important process of reconciling the federal statutes outlawing sex-based discrimination in employment with numerous "protective" state employment laws applicable only to female employees.

96 Sup. Ct. at 804.

Although an alternative ground for the *Homemakers* decision was the fact that during the interval between District Court and Circuit Court consideration the California legislature amended the statute to moot the question to some degree (509 F.2d at 23), evidence of the continuing viability of the Ninth Circuit rule is its use by the Arkansas majority in the instant case.

2. **Congress Did Not Intend to Lower the Wages of Female Employees as a Consequence of Remedying Sex Discrimination in Employment.**

It would require an extraordinary clear expression of congressional intent to permit a conclusion that Congress meant to lower the wages of women—the necessary consequence of the decision below—when it banned sex discrimination in employment. No such expression, or even implication, is available.

Obviously Congress has the power to exercise exclusive control over the wage levels of employees of employers in interstate commerce. But Congress is not compelled to occupy a whole field; judicial treatment of a supersession contention requires measurement of the occupation. *E.g., Colorado Anti-Discrimination Commn. v. Continental Air Lines, Inc.*, 372 U.S. 714, 722-24 (1963).

The best test of what Congress intended is what Congress said. Two anti-preemption statements are contained in the Civil Rights Act of 1964. As part of Title VII:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7.[13]

Admittedly the legislative history of the ban on sex discrimination is "peculiar."[14] But there is distinct evidence that leading supporters of the inclusion intended to preserve state legislation that is beneficial to women. A dichotomy was described by Congresswoman Griffiths:

> Some people have suggested to me that labor opposed "no discrimination on account of sex" because they feel that through the years protective legislation has been built up to safeguard the health of women. *Some protective legislation was to safeguard the health of women, but it should have safeguarded the health of men, also.* Most of the so-called protective legislation has really been to protect men's rights in better paying jobs.

110 CONG. REC. 2580 (1964). (Emphasis added.)

Congresswoman St. George addressed herself directly to the effect of the amendment on state protective legislation, quoting her prior Rules Committee colloquy with ranking Congressman McCulloch:

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[13] The intention is reemphasized by another provision applicable to the entire Act, 42 U.S.C. § 2000h-4.

[14] Kanowitz, *supra*, note 3, at 310. There were no committee reports on the sex discrimination amendment. It was added on the House floor, in an apparent attempt to defeat the entire bill. Developments in the Law, *supra* note 10, at 1167.

> MRS. ST. GEORGE. So, this is really being written for those 18 States [which did not have equal employment opportunity legislation], to all intents and purposes, because we already have this, so this will not make any very great difference to us, except if it supersedes the law of the State. Is it going to do that?
>
> MR. MCCULLOUGH. It is not intended to supersede the laws of the States, except when it is in conflict *and* grants or insures *lesser* rights than are provided for in this legislation.

Ibid. (Emphasis added.)

After referring to such comments of Congresswoman St. George, Congresswoman Kelly concluded:

> I believe in equality for woman, and am sure that the acceptance of the amendment will not repeal the protective laws of the several States. I therefore urge all to support this amendment and hope it will prevail.

Id. at 2583. It did, the same day. *Id.* at 2584.

An even more distinct command of Congress is applicable. The substantive section of the Equal Pay Act of 1963 includes a proviso: "an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

There are substantial reasons to conclude that Title VII must be read in light of this condition.

Title VII refers expressly to a relationship with the Equal Pay Act of 1963. 42 U.S.C. § 2000e-2(h). Because of that section, the Equal Employment Opportunity Commission has

decided, "a defense based on the Equal Pay Act may be raised in a proceeding under Title VII." 29 C.F.R. § 1604.8(b).

"Although the Civil Rights Act is much broader than the Equal Pay Act, its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act." *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970). Conversely, "[t]he sex discrimination provisions of Title VII of the Civil Rights Act of 1964 must be construed in harmony with the Equal Pay Act of 1963 . . . ." *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 170 (5th Cir. 1975). *See also Hays v. Potlatch Forests, Inc., supra*, 465 F.2d at 1083; *California Dept. of Industrial Relations v. Homemakers, Inc., supra*, 96 Sup. Ct. at 804, no. 2.

Finally, during consideration of amendments to Title VII for the Equal Employment Opportunity Act of 1972, the following Senate colloquy took place:

MR. HART. . . . Mr. President, the Equal Pay Act of 1963 was the first Federal law enacted by the Congress to prohibit wage discrimination on the basis of sex. It has enjoyed widespread support, and we should make explicit the fact that Congress does not intend the Equal Pay Act to be affected by proposals to expand and strengthen Title VII of the Civil Rights Act of 1964. I should like to ask the distinguished chairman of the Senate Labor Committee if he will confirm my understanding that it is not the will or desire of this body that the Equal Pay Act of 1963 be superseded in whole or in part by any action taken by the Congress to provide most sorely needed amendments to Title VII of the Civil Rights Act.

MR. WILLIAMS. . . . I certainly want to make the situation very clear here today. The distinguished Senator from Michigan is correct in his assumption that it is not our intention in any way to affect or diminish the remedies available under the Equal Pay Act of 1963.

118 CONG. REC. 1677 (1972).[15]

Thus Congress did not intend by federal legislation to lower the wages of women as a method of remedying sex discrimination. The "federal preemption" on which the Supreme Court of Arkansas relied cannot be demonstrated.[16]

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[15] This exchange occurred after the District Court decision in *Potlatch* but before any decision in *Homemakers*. The Arkansas statute in issue also describes a relationship with the Fair Labor Standards Act, of which the Equal Pay Act is a part.

[16] Most of the voluminous writing on the issue has dealt with jurisprudential aspects of an "extension of benefits" theory, and the majority view has been that beneficial laws should be extended. *E.g.*, articles cited in notes 3, 4, 10, 16, 17. Such characterization is subsumed when the intention of Congress is ascertainable. However, as can be discussed in detail on full review, this Court has "extended benefits" in many other situations. Comment, *Extension versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 COLUM. J. LAW & SOC. PROBL. 115 (1975). The Solicitor General, for the EEOC, urged certiorari and extension in *Homemakers*.

CONCLUSION

For the reasons stated,[17] a writ should be granted.

Respectfully submitted,

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[17] In addition, by full review the Court can perform a vital national service by clarifying projected effects of the proposed Equal Rights Amendment to the Constitution of the United States. A major issue between those for and against adoption concerns whether "protective" laws for women will be invalidated or extended to men. *See, e.g.*, Brown, etc., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 912-36 (1971). Advocates, state legislatures, and the people need to know the accurate consequences of their pending decision.

APPENDIX

APPENDIX A: OPINIONS BELOW

STATE OF ARKANSAS, Appellant,

v.

FAIRFIELD COMMUNITIES LAND CO.,
Appellee.

No. 76-46.

Supreme Court of Arkansas.

July 19, 1976.

GEORGE ROSE SMITH, Justice.

This action was brought in the name of the State by the Director of Labor, on behalf of a number of the appellee's female employees, to recover overtime wages that assertedly should have been paid under Act 191 of 1915, as amended. Ark.Stat. Ann. § 81-601 *et seq.* (Repl.1960). The appellee contends that the Arkansas statute is no longer valid, having been pre-empted, under the Supremacy Clause, by this provision in the Civil Rights Act of 1964:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." [42 U.S.C.A. § 2000e-2.]

This appeal is from a judgment sustaining the appellee's position and dismissing the complaint.

At the outset it is insisted by the appellant, for the first time, that the circuit court did not have jurisdiction of the subject matter, because the proof does not show that the Civil Rights Act is applicable to the appellee, as an employer. That is, it is not shown that the appellee is engaged in an industry affecting interstate commerce, with 15 or more employees and a specified annual volume of business, as required by federal legislation.

That argument is not sound. Our circuit courts, unlike the federal courts, are tribunals of general jurisdiction with constitutional authority over all cases not within the exclusive jurisdiction of another court. Ark. Const., Art. 7, § 11 (1874); *Whittaker v. Watson*, 68 Ark. 555, 60 S.W. 652 (1901). Here the Director of Labor, as plaintiff, selected the forum himself. The circuit court unquestionably has prima facie jurisdiction of an action for the recovery of unpaid wages. The appellee merely pleaded the impact of the Civil Rights Act as a defense to the action. If the plaintiff thought that the defendant was not entitled to invoke the Act, that issue should have been raised in the trial court. But the issue was not jurisdictional, because even if the defendant had not been entitled to invoke the Act the case would still have proceeded to judgment. For all we know, the plaintiff may have known that the defendant came within the Act and may simply have decided not to encumber the record with needless proof. Thus the appellant has no standing to raise the issue here, subject-matter jurisdiction not being involved.

Now, the merits. Our statute undoubtedly discriminates in favor of women on the sole basis of their sex. The employer must pay time-and-a-half overtime when the work day exceeds eight hours or the work week six days. Ark.Stat.Ann. § 81-601. There is no similar provision for male employees. It is fair to assume that an employer might therefore decide to hire a man rather than a woman, both being qualified. The appellee accordingly argues that our statute conflicts with the federal law, which prohibits any discrimination in hiring or in the terms of employment, on the basis of sex.

In answer to that argument the appellant relies upon the opinions in *Potlatch Forests v. Hays*, 318 F.Supp. 1368 (E.D.Ark. 1970), and *Hays v. Potlatch Forests*, 465 F.2d 1081 (8th Cir. 1972), affirming the district court. Those cases upheld the Arkansas statute, upon the ground that the employer could comply with both the federal act and the state act simply by paying overtime to both men and women at the rate specified in the Arkansas statute. An essentially contrary view was taken in *Homemakers, Inc., Los Angeles v. Division of Indus. Welf.*, 356 F.Supp. 1111 (N.D.Cal.1973), affirmed, 509 F.2d 20 (9th Cir. 1974). Those courts held, as did the trial judge in the case at bar, that for a court to extend the benefits of the state statute by requiring men to be paid at a statutory scale applicable only to women would be an exercise of legislative rather than judicial power.

We are unable to agree with the *Potlatch* opinions, because we think they oversimplify the issue. In *Potlatch* both courts treated the Arkansas statute as a wages-and-hours law having as its sole purpose the payment of female employees at time-and-a-half for overtime. Neither opinion mentions other aspects of the Arkansas law which we think to be of controlling weight.

The original 1915 statute had several provisions linking wages with the health of the female employees protected by the act. For example, the act created a three-member commission whose duty it was to adopt regulations making it certain that women would not be employed "at a lower rate of wages than will supply said female employees the cost of proper living, and safeguard their health and welfare." Act 191 of 1915, §§ 9 and 11. A 1935 amendment to the statute gave to a commission the power to issue, after a hearing, permits exempting from the statute females in executive or managerial positions. Act 150 of 1935; Ark.Stat.Ann. § 81-606. A 1943 amendment provided that no female could be employed for overtime of a permanent nature in excess of one hour a day without a permit from the Commissioner of Labor. Act 70 of 1943; Ark.Stat.Ann. § 81-601.

It must be emphasized that the constitutionality of Act 191 was upheld on the ground that it was a reasonable method of safeguarding the health of female employees. *State v. Crowe*, 130 Ark. 272, 197 S.W. 4, L.R.A.1918A, 567, Ann.Cas. 1918D, 460 (1917). The majority and dissenting opinions in that case indicate clearly that the statute would not have been sustained had it merely regulated wages and hours, without regard to the health of the female employees.

In the intervening 60 years the pendulum has swung far in the opposite direction. The Supreme Court now holds that an act which discriminates between men and women is invalid as a denial of the equal protection of the law unless there is a reasonable basis for the distinction. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Hence Act 191 is now prima facie invalid, because with respect to many office and clerical jobs there is no sound reason for paying time-and-a-half overtime to women while denying it to men. Of course it follows that if the Arkansas act is now invalid, its benefits cannot simply be extended to male employees under the *Potlatch* rationale.

The Director of Labor advances two theories in his effort to have Act 191, as amended, continued in force. First, it was stipulated below that although the Department of Labor still issues permits under the act, it no longer conducts hearings under §§ 81-606 and -607 to determine whether the particular female employee actually exercises executive or managerial authority. One short answer to this argument is that the discriminatory provision is still in the statute, whether the Department obeys it or not. A second answer is that the stipulation does not touch upon the equally questionable permit requirement in § 81-601, by which a permit must be obtained for any permanent overtime employment of a female in excess of one hour a day.

The Director's second suggestion is that the permit provisions and other discriminatory sections of Act 191, as amended, be held unconstitutional but separable, leaving in effect a simple

wages-and-hours law that would benefit male employees under *Potlatch*. What we have already said pretty well answers this argument. Separability means that the legislature would have enacted the valid portion of the act even if it had known the rest to be invalid. But just the opposite is true here. In *Crowe* we sustained Act 191 only because it was considered to be a health measure rather than a mere regulation of wages as such. We could not with even a semblance of judicial integrity completely reverse our position and solemnly declare that the legislature would have adopted Act 191 as a mere wage regulation without regard to the very provisions that saved the statute from unconstitutionality at the time it was passed.

Affirmed.

ROY, J., dissents.

ELSIJANE TRIMBLE ROY, Justice (dissenting).

I disagree with the majority's opinion that the pertinent Arkansas statute is no longer valid. In my opinion, this issue was decided in *Potlatch Forests v. Hays*, 318 F.Supp. 1368 (E.D. Ark.1970), and *Hays v. Potlatch Forests*, 465 F.2d 1081 (8th Cir. 1972), affirming the district court. As noted in the majority opinion, those cases upheld the Arkansas statute upon the ground that the employer could comply with both the Federal act and the State act by paying overtime to both men and women at the rate specified in the Arkansas statute.

The majority refused to follow the *Potlatch* cases and cited *Homemakers, Inc., Los Angeles v. Division of Indus. Welf.*, 356 F.Supp. 1111 (N.D.Cal.1973); affirmed, 509 F.2d 20 (9th Cir. 1974), as authority for holding the Arkansas statute invalid even though it differed materially from the California statute. Furthermore, the logic in the *Homemakers* decision is not as sound

as the *Potlatch*[1] rationale, since to apply the *Homemakers* doctrine would thwart the purpose of both the State and Federal statutes. Here, the choice is between invalidating the Arkansas statute and lowering wages for female employees or holding the statute valid and equalizing benefits between male and female employees. Extension of wage benefits to men by virtue of the Federal enactment is consistent with the presumption of constitutionality as to both the Arkansas law and the Civil Rights Law of 1964.

The Eighth Circuit in its *Potlatch* opinion stated:

> We agree with the District Court that *Congress expressly disclaimed any general preemptive intent in enacting Title VII*, and that the Arkansas statute can be held invalid only if it is in conflict with the Civil Rights Act. See, 42 U.S.C. §§ 2000e-7 and 2000h-4 [italics supplied].
>
> Insofar as the Arkansas statute results in discrimination against men, we also agree with the trial court that conflict with Title VII can be avoided by requiring Potlatch to pay its male employees the same premium overtime rate which it is compelled to pay its female employees. As the trial court pointed out:
>
> "* * *
>
> "As far as Act 191 of 1915 [Ark.Stat.Ann. § 81-601] is concerned, an employer can comply with it and with the Civil Rights Act by paying daily overtime to both men and women, * * *. The Arkansas statute does not say that women must be paid more than men; it *simply says that they must be paid daily overtime without making a similar requirement as to men* [italics supplied]."

[1] Normally if there is a conflict between the circuits on an issue of law Arkansas courts give preference to the Eighth Circuit Court of Appeals interpretation since Arkansas is one of the states in that circuit.

For compelling reasons the Arkansas overtime act should be preserved. It is a law which serves untold numbers of working people. Neither repeal of the law nor judicial legislation is necessary, but a fair and reasonable accommodation is warranted. Any conceivable disharmony between the State and Federal laws may be fairly accommodated by adopting the extension of benefits rule. There is nothing more fundamental to the welfare of the Arkansas citizenry than adequate wages, and nothing more essential than the law's even application in this vital area. To uphold the existing law would produce the proper balance by preserving its benefits while fulfilling Title VII's promise of fair employment practices.

Furthermore, there is ample precedent to support the judicial extension of benefits. *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), and *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972).

Objections are also made to the Arkansas act on the grounds that the permit requirements are invalid and consequently the entire statute must fall. We do not agree with the conclusion of the majority that the permit provisions are not separable from the wage provisions of the statute.

It is a well established rule of law that if a statute is valid in part and invalid in part, then the valid part may stand provided it fairly answers the object or purpose of the passage of the law, and the deletion of the invalid portion will not make the statute meaningless.

The absence of the permit provisions certainly would not make the wage-hour part of the Arkansas overtime statute meaningless. The permit provisions do not affect the statute's substance, but are merely additional aids in enforcement of the wage provisions.

In *Brooks v. Wilson*, 165 Ark. 477, 265 S.W. 53 (1924), we said:

> . . . [I]f any special provision of an act be unconstitutional and can be stricken out without affecting the validity of the residue of the act, it will be done, and the remainder of the act allowed to stand. *Cribbs v. Benedict*, 64 Ark. 555, 44 S.W. 707; *State v. New York Life Ins. Co.*, 119 Ark. 314, 171 S.W. 871, 173 S.W. 1099; *State v. Woodruff*, 120 Ark. 406, 179 S.W. 813; and *Davis v. State*, 126 Ark. 260, 190 S.W. 436.

See also *Levy v. Albright*, 204 Ark. 657, 163 S.W.2d 529 (1942).

Therefore, even if the permit provisions are invalidated the remainder of the statute would suffice to effect the object of having employees receive premium pay for overtime work.

Accordingly, I think the case should be reversed and remanded.

APPENDIX B: STATUTES INVOLVED

Ark. Stat. Ann. § 81-601. (Repl. 1960). Maximum hours for women—Overtime pay—Exceptions from act.—No female shall be employed in this State in any manufacturing, mechanical or mercantile establishment, laundry, or by an express or transportation company, or by any hotel, restaurant, or eating place, or by any building and loan association, insurance company, or by any establishment engaged in finance or credit business, or by any person, persons, partnership, or corporation whatsoever in any capacity except in those occupations that are expressly exempted by law, for more than eight (8) hours in any one [1] day or more than six (6) consecutive days in any one (1) week, unless such female employee receives compensation for her employment in excess of the hours above specified at the rate of not less than one and one-half [1½] times the regular rate at which she is employed and that a permit be secured from the Commissioner of Labor for any overtime of a permanent nature in excess of one hour a day. Provided, however, that the provisions of this act [§§ 81-601—81-603, 81-608—81-619] do not apply to domestic, agricultural or horticultural employees, or those female employers (employees) exempted by Section 13 (a), Paragraph (11) of the Federal Fair Labor Standards Act of 1938. Provided, further, that the present law governing the employment of children under sixteen (16) years of age shall not be repealed by this Act.

Provided however, there shall be exempted from this Section any employer and the female employees of such employer who is a processor or canner of fruits and vegetables and who is subject to and complies with the provisions of the Federal Fair Labor Standards Act of 1938 as amended.

42 U.S.C. § 2000e-2. Unlawful employment practices—Employer practices.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-7. Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000h-4. Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

29 U.S.C. § 206. (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within

any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

U.S. Const., Art. VI, Cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX C:

ADMINISTRATIVE REGULATIONS INVOLVED

29 C.F.R. § 1604.2(b). Effect of sex-oriented state employment legislation.

(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, for more than a specified number of hours per day or per week, and for certain periods of time before and after childbirth. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex. The Commission has concluded that such laws and regulations conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(2) The Commission has concluded that state laws and regulations which discriminate on the basis of sex with regard to the employment of minors are in conflict with and are superseded by Title VII to the extent that such laws are more restrictive for one sex. Accordingly, restrictions on the employment of minors of one sex over and above those imposed on minors of the other sex will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(3) A number of states require that minimum wage and premium pay for overtime be provided for female employees. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the payment of minimum wages or overtime pay required by state law; or

(ii) It does not provide the same benefits for male employees.

(4) As to other kinds of sex-oriented state employment laws, such as those requiring special rest and meal periods or physical facilities for women, provision of these benefits to one sex only will be a violation of Title VII. An employer will be deemed to have engaged in an unlawful employment practice if:

(i) It refuses to hire or otherwise adversely affects the employment opportunities of female applicants or employees in order to avoid the provision of such benefits; or

(ii) It does not provide the same benefits for male employees. If the employer can prove that business necessity precludes providing these benefits to both men and women, then the state law is in conflict with and superseded by Title VII as to this employer. In this situation, the employer shall not provide such benefits to members of either sex.

(5) Some states require that separate restrooms be provided for employees of each sex. An employer will be deemed to have engaged in an unlawful employment practice if it refuses to hire or otherwise adversely affects the employment opportunities of applicants or employees in order to avoid the provision of such restrooms for persons of that sex.

29 C.F.R. § 1604.8 Relationship of Title VII to the Equal Pay Act.

(a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is co-extensive with that of the other prohibitions contained in Title VII and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of Section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

(c) Where such a defense is raised the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

29 C.F.R. § 800.162.—Overtime Payments Required by State Law.

The application of the equal pay provisions of the Act may also be affected by State legal requirements with respect to overtime pay. If as a result of a State law, female employees in an employer's establishment are paid overtime premiums for hours worked in excess of a prescribed maximum in any workday or workweek, the employer must pay male employees performing equal work in such establishment the same overtime premiums when they work such excess hours, in order to comply with the equal pay provisions of the Fair Labor Standards Act. This would be true even though both the male and the female employees performing equal work are otherwise qualified for exemption from the overtime pay requirements of section 7 of the Fair Labor Standards Act. It would not be true, however, unless the overtime requiring the premium pay is actually being worked by the women.